

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GARY B. KELSEY)	
Claimant)	
VS.)	
)	
SHAW DISTRIBUTING)	Docket No. 244,514
Respondent)	
AND)	
)	
INSURANCE COMPANY UNKNOWN)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund appeals the preliminary hearing Order of Administrative Law Judge John D. Clark dated July 13, 1999. The Administrative Law Judge found that claimant had proven accidental injury arising out of and in the course of his employment and awarded benefits in the form of temporary total disability compensation and medical treatment with Dr. James Prescott as the authorized treating physician. Benefits were assessed against the Fund.

ISSUES

Has claimant proven accidental injury arising out of and in the course of his employment with respondent on the date alleged?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

Claimant alleges accidental injury on April 21, 1999, when, while in the back of his employer's delivery van, he bent over to pick up a pen and his "back went out."

The Fund contends that the act of bending over and picking up a pen was a personal risk to claimant and should not be considered a risk associated with his employment.

The Fund further contends that claimant's credibility is at question as, when claimant first sought medical treatment, he advised both his supervisors and the initial health care providers that he was injured when he fell off the steps of his truck. Claimant acknowledged at the preliminary hearing that he provided an inconsistent history of injury to both his health care providers and his supervisors. The Fund argues this damaged claimant's credibility to the point where his description of the pen incident cannot be believed and benefits must be denied.

Claimant, on the other hand, argues that the act of picking up a pen in the back of a delivery van, that claimant had entered in order to inventory the products prior to beginning his day's deliveries, is directly connected with his employment with respondent. Claimant argues the only reason he was in the van was to prepare for his day's work with respondent, and bending over to pick up a pen, which he would use during his day's labors, was a risk directly associated with the job of delivering respondent's product. Claimant further argued that the inconsistent histories provided by claimant are trivial at best. Claimant further goes on to state that the Administrative Law Judge had the opportunity to view claimant's testimony in person and to assess the claimant's credibility during this testimony.

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984).

The evidence in this case is that claimant was in his employer's van, preparing to do an inventory, when he suffered an injury. Whether that injury occurred while picking up a pen or falling down the steps exiting the van, either way, it occurred both out of and in the course of his employment. The Fund's argument that claimant's act of bending over to pick up the pen was a personal risk is rejected.

With regard to the discrepancy in claimant's testimony, the Appeals Board acknowledges that certain inconsistencies do exist in the record. The claimant testified before the Administrative Law Judge at a preliminary hearing. The Board generally finds some deference should be given to the administrative law judge's conclusions where that administrative law judge has the opportunity to assess the credibility of witnesses through live testimony. The Administrative Law Judge, in granting claimant benefits, apparently found claimant credible. The Appeals Board, in reviewing the evidence, does not find the conflict in claimant's testimony to be sufficiently egregious as to deny benefits under these circumstances. Therefore, the Appeals Board affirms the Administrative Law Judge's finding that claimant proved accidental injury arising out of and in the course of his employment.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated July 13, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS
Terry J. Torline, Wichita, KS
Christopher J. McCurdy, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director